

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17560 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
  5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

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MOHMAD VASIM MOHMAD IQBAL SHAIKH

Versus

STATE OF GUJARAT  
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Appearance:

1. Special Civil Application No. 17560 of 2003  
MR NK MAJMUDAR for Petitioner No. 1  
RULE SERVED for Respondent No. 1-2,3  
Ms P B Sheth, AGP for Respondent No. 3
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CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 18/03/2004

ORAL JUDGEMENT

The petitioner-detenu has preferred this petition

under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and setting aside an order dated 18.8.2003 passed by respondent No. 1 under section 3(2) of the Gujarat Prevention of Anti-social Activities Act, 1985 (for short, 'the PASA Act'). It has been alleged against the petitioner that he was involved in two offences registered at C.R. No. II - 241/2003 and CR.No.II-258/2003 before Chokbazar police station, Surat dated 30.5.2003 respectively for offences punishable under section 3, 4, 5, 7 and 8 of The Immoral Traffic Prevention Act. The petitioner was arrested in connection with those two offences on 27.6.2003. Therefore, the petitioner was detained on the strength of the said two offences registered against him. Over and above the said offences, the detaining authority has considered statements of two unnamed witnesses referred to in the grounds of detention at pages 21 and 22. Thereafter, the petitioner was detained on the ground of the said two offences and on account of the statement rendered by two unnamed witnesses. The petitioner has challenged the aforesaid order of detention on the ground that there was delay in passing the order of detention, that the names of the unnamed witnesses have not been supplied to the petitioner and that the detaining authority or the State Government has not filed affidavit. That therefore, the order of detention is illegal and deserves to be set aside. The petitioner has, therefore, prayed that the order of detention be set aside and the petitioner be released from detention.

2. On receiving the petition, rule was issued and in response to the service of notice of rule, Ms.P B Sheth, learned AGP has appeared. I have heard the learned Advocate for the petitioner and the learned AGP and have perused the papers. It is not in dispute that the order of detention is passed under section 3(2) of the PASA Act. It is also not in dispute that the petitioner has been detained by order dated 18.8.2003 by second respondent on the ground that two offences were registered against the petitioner as aforesaid and two unnamed witnesses have rendered their statements involving the statement about unlawful activities. On the other hand, the impugned order dated 18.8.2003 also shows that the order has been passed on the aforesaid consideration. Learned Advocate for the petitioner has argued at length that the first offence was registered on 30.5.2003 and the second offence was registered on 8.6.2003. That the petitioner was arrested in the aforesaid offences on 27.6.2003 and thereafter the impugned order was passed on 18.8.2003. That therefore,

there was time lag of nearly two months between the date of last registered offence and the date of the detention order. That therefore, the order of detention is illegal. In support of the said argument, learned Advocate for the petitioner has relied upon a decision of this Court in the case of Bharatbhai Ratansing Ninama v. State of Gujarat, reported in 2002 (1) GLR 107. There it has been observed that when the detention order was passed after a delay of five months after the last complaint was made against the delinquent and when the delay has not been explained to the satisfaction of the Court, then the detention order is required to be quashed and set aside.

3. On the other hand, Learned AGP has argued that the registered offences are not the only base for passing the order of detention. That thereafter the statements of unnamed witnesses were recorded and they have been supplied to the petitioner also. That the said statements were recorded on 29.7.2003 and they were verified on 13.8.2003. That there was no delay in passing the order of detention subsequent to recording of the said two statements.

4. It is true that those statements are there on record and copies thereof have been supplied to the petitioner along with the detention order itself. At this stage, learned Advocate for the petitioner has argued that the said two statements have been recorded with a view to fill up the gap between the date of last registered offence and the date of detention in order to avoid explaining the delay in passing the order of detention. He has therefore, argued that the fact of the said two statements of the said two unnamed witnesses may not be taken into consideration.

5. On this aspect of the case, learned advocate for the petitioner has relied upon a decision rendered in the case of Elesh Nandubhai Patel v. Commissioner of Police, Ahmedabad. It would be relevant to refer to para 21 of the said decision which may be reproduced for ready reference:

"In the instant case, the last registered case is of May 20, 1996. The petitioner detenu was granted anticipatory bail by the competent court. He was also granted regular bail subsequently. The impugned order of detention has been passed on November 05, 1996, i.e. after a delay of 5 months and 15 days. It is of course true that the detaining authority has relied on two

incidents of 2nd October and 10th October 1996, both unregistered cases. I have gone through the allegations, I fail to understand if the allegations are really of such a grievous nature, why the cases have not been registered against the petitioner. There appears to be some substance in the contention of the petitioner that these two unregistered cases have been referred only with a view to cover up the gap or to give life to a stale case. This unexplained delay makes a ground of detention not prodimate, vitiating the order of detention itself. If I am to buttress my findings, I would say the reference may be made to the decision of the Supreme Court in Anand Prakash v. State of U P, reported in AIR 1990 SC 516 and Pradeep Nilkant v S. Ramamurthy reported in 1993 (2) Suppli. SCC 61."

6. On going through the said observations in para 21 of the said decision, it is clear that in some cases, the detaining authority may be tempted to have some additional materials on record to fill up the gap between the date of last registered offence and the date of detention order. This position has not been clarified on record. Therefore, it would not be improper or illegal to follow the observations made in para 21 of the said decision. This would clearly indicate that there is an unexplained delay in passing the order of detention since the offence was last registered on 8.6.2003 and the order of detention has been passed on 18.8.2003. Considering the unexplained delay, the order of detention would naturally stand vitiated.

7. Learned Advocate for the petitioner has then, argued that the detaining authority has kept away names of the two witnesses whose statements were recorded and taken into consideration. That the names of those witnesses have not been disclosed and appropriate procedure was not adopted before concealing their names and keeping their names away from the petitioner's notice. It is true that under section 9(2) of the said Act, the detaining authority has a privilege to keep away names of the witnesses from the detenu with a view to safeguard the said witnesses. Sometimes the witnesses may be threatened because of the activities of the detenu and, therefore, they would not like to disclose their names on record. Therefore, a privilege has been given to the detaining authority to keep names of the witnesses away from the notice of the petitioner. At the same time, before claiming privilege under section 9(2) of the

said Act, it must be shown from the record that there were credible materials placed before the detaining authority for the exercise of the powers for claiming privilege under section 9(2) of the said Act. It has been observed in the case of Kishore Naginbhai Parmar v. State of Gujarat, reported in 2000 (4) GLR 3236 that a mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witnesses, under such circumstances, can be of no virtue, in absence of contemporaneous material. That the detention, therefore, stands vitiated for want of proper exercise of powers under section 9(2) of the said Act. It has, therefore, been laid down by this court that before the names of the witness are kept away from the notice of the detention, there should be evidence to show that the powers under section 9(2) of the said Act have been properly exercised. In the present case, we find that it is not noticed from the record that before exercising the said power under section 9(2), the detaining authority had made efforts to verify the veracity, genuineness and correctness of the statements made by the witnesses before him as well as before other officers. In that view of the matter, when powers under section 9(2) of the said Act are not found to have been exercised in accordance with the provisions of the Act itself, then further detention of the detenu cannot be sustained in the eye of law. It has been held in the aforesaid decision that the resulting infringement of a constitutional right of the detenu of making effective representation under Article 22(5) due to non-disclosure of name of witnesses and once it is found that valuable right of making effective representation under Article 22(5) of the Constitution of India has been taken away then further continuation of detention cannot be sustained in the eye of law.

8. In above view of the matter, when the impugned order is found to be not sustainable in the eye of law, other grounds are not required to be taken into consideration.

In above view of the matter, it is clear that the order of detention passed by the second respondent and impugned in this petition is not found to be legal and valid and, therefore, it is required to be quashed.

Learned AGP has relied upon a decision of this Court in the case of Premsing Rajput v. State of Gujarat, reported in 2000(4) GLR, 3675 wherein it has been observed that the delay has to be computed from the date of commission of last offence. In other words, it

has been observed in it that if some offences have been registered against a detenu, then, the date of last registered offence is required to be considered. Moreover, if there are registered offences and unregistered offences, the last of them is required to be considered. On the strength of such argument, the learned AGP contended that considering the statements of unnamed witnesses recorded subsequent to the last registered offence, the order of detention cannot be treated to have been passed after delay. In this respect, again it would be necessary to refer to the decision of this court rendered in para 21 of 1997 (1) GLH 381 which would be a clear reply to the said decision in absence of any explanatory affidavit submitted on behalf of the respondent. Therefore, this decision will not be helpful to the respondent State.

9. For the foregoing reasons, this petition is allowed. The impugned order of detention dated 18.8.2003 passed by respondent No.2 against the petitioner-detenu is quashed and set aside. The petitioner-detenu-Mohmad Vasim Mohd. Iqbal Shaikh is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute to the aforesaid extent. There shall be no order as to costs. D.S. permitted.

[D P Buch, J.]

msp